**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MICHAEL E. KEATING** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | |
| **ZEITLOW DISTRIBUTING CO.** | ) | Docket No. 1,058,635 |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **NATIONWIDE MUTUAL INS. CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of Special Administrative Law Judge Jerry Shelor's November 6, 2013 Award. The Board heard oral argument on February 19, 2014.

### APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. David Bogdan, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the Award's stipulations.

The parties agreed at oral argument that the Board may consult and cite the AMA *Guides*[1] (hereinafter *Guides*). Claimant agreed at oral argument that his client cannot receive a whole body award for ankle pain because K.S.A. 2011 Supp. 44-510d(c) limits compensation for an ankle injury to that available for a lower leg injury. Claimant also agreed at oral argument that he has no impairment associated with his dental injury. Claimant acknowledged whether he has a whole body impairment hinges on whether his right trochanteric bursitis involves the body as a whole.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. See *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. See, e.g., *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sep. 15, 2011) and *Dunfield v. Stoneybrook Retirement Com.*, No. 1,031,568, 2008 WL 2354926 (Kan. WCAB May 21, 2008).

## ISSUES

The Award indicated claimant sustained a 2% impairment to the right lower extremity based upon the rating of the court-ordered physician, David Hufford, M.D. The Award further indicated claimant had no task loss and rejected claimant's request for a work disability. The Award also denied future medical treatment.

Claimant requests the Award be modified to reflect a 24% whole body impairment and a 77.75% work disability. Claimant further argues entitlement to future medical treatment. Respondent maintains the Award should be affirmed.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability?

(2) Is claimant entitled to future medical?

## FINDINGS OF FACT

Claimant began working for respondent on September 1, 2006, as an outside salesman of farm equipment, mainly in western Kansas and Oklahoma. Claimant's duties involved long distance driving, loading and unloading product, and operating a forklift and a pallet jack. He drove a three-quarter-ton truck with a trailer holding livestock equipment – cattle squeeze chutes, cattle panels and miscellaneous livestock waterers – as well as his tent display. He might wash the truck and check fluids, but he would not change the oil. When lifting equipment, he normally used a forklift or had someone assist him. The most he would manually lift was 70-80 pounds. Claimant attended up to six farm shows a year and was required to work some shows by himself.

On November 16, 2011, claimant was at a farm show in McCook, Nebraska. There was approximately three inches of snow and ice on the ground. Claimant slipped and fell while walking downhill. As he fell, claimant gritted his teeth and heard a crack. As a result of the fall, claimant fractured his right ankle, injured his right knee and chipped two teeth.

Following the accident, claimant was transported by ambulance to a hospital where his right foot was put in a boot. Three days later, in Hutchinson, Kansas, he had ankle surgery, which included internal fixation requiring a plate and eight or nine screws. Claimant was off work until March 7, 2012.

Claimant sought treatment with a chiropractor on April 27 and 30, 2012. He testified he sought chiropractic treatment because he was limping, which caused his back and right side to hurt. An illustration contained in the chiropractic notes has a circle around the right hip area, the right thigh and the right pelvis. The chiropractor's April 27, 2012 notes focus on right hip and right ankle pain.

The accident also caused a torn meniscus in claimant's right knee, which Dr. Loewen surgically repaired on May 24, 2012. Claimant was off work until June 8, 2012.

On November 6, 2012, claimant was seen at his attorney's request by Pedro Murati, M.D., who is board certified in physical medicine and rehabilitation, and certified as an independent medical examiner. Claimant complained of avoiding hard foods because of his dental work, right ankle discomfort with weather change and right knee stiffness, but no low back pain. Dr. Murati reviewed claimant's right knee and ankle imaging studies.

During Dr. Murati's physical examination, claimant had full range of motion of the right hip, mild crepitus of the right knee and full range of motion and no instability of the right ankle, with mild crepitus. Claimant's right thigh was 4.9 centimeters smaller in circumference than his left thigh. Dr. Murati noted claimant's right trochanteric bursa was tender on palpation. Claimant had a positive patellar compression test involving his right knee, as well as a positive lateral patellar apprehension test. Additionally, claimant had full right knee range of motion, except for having a 13° flexion contracture. The parties agreed at oral argument that a flexion contracture affecting the knee is a deformity or inability in which a person is unable to fully straighten his or her leg.

Dr. Murati diagnosed claimant with a right ankle fracture, right knee injury, including patellofemoral syndrome, right trochanteric bursitis and difficulty with mastication (chewing). Dr. Murati assigned a 24% impairment to the body as a whole pursuant to the *Guides*, which was broken down as follows:

- 7% right lower extremity impairment for trochanteric bursitis (Table 64);
- 2% right lower extremity impairment for a partial lateral meniscectomy (Table 64);
- 20% right lower extremity impairment for knee flexion contracture (Table 41);
- 5% right lower extremity impairment for patellofemoral syndrome (Table 62);
- 13% right lower extremity impairment for thigh atrophy (Table 37);
- 5% whole person impairment for the right ankle based on pain (Chapter 15, titled "Pain"); and
- 5% whole person impairment for mastication difficulty (Table 6 on pg. 231).

Dr. Murati recommended claimant have at least yearly follow-ups for the right lower extremity, right hip and low back and yearly dental follow-ups. Dr. Murati indicated claimant will need a right knee replacement as a result of his accident.

Respondent terminated claimant's employment on December 31, 2012. Claimant was 60 years old at the time his employment was terminated.

On March 19, 2013, David Hufford, M.D., examined claimant for a court-ordered independent medical examination. Dr. Hufford reviewed claimant's treatment records, claimant's right knee MRI films and right ankle x-rays. Claimant had various complaints, including a right ankle fracture, cracked molars that required two dental implants and a crown, and continued right knee pain and swelling after surgery and inability to straighten his leg, which led to altered gait and ongoing low back and bilateral hip pain. Claimant denied difficulty with glutition (swallowing), taste or mastication.

Dr. Hufford's examination of claimant's low back and hips revealed no direct vertebral tenderness, no direct sacroiliac joint tenderness, minimal to trace myofascial tenderness of the lumbar paraspinous musculature without trigger points or guarding, and mild tenderness of the greater trochanters. Claimant's leg evaluation revealed normal and symmetric strength in the lower extremities, the absence of knee and ankle reflexes, right knee pain on straight leg raising, mildly antalgic gait, no swelling or effusion of the knees, the presence of knee stability, no joint line tenderness, mild patellar crepitus, the ability to flex his knee to 120°, but knee extension lacked 30°. Dr. Hufford observed claimant had a right knee flexion contracture, which caused claimant to limp. Claimant had no ankle or calf swelling or tenderness. His right calf was one centimeter greater in circumference than his left calf. Claimant did not have Achilles tenderness. Claimant could dorsiflex his ankle to 20° and plantar flex to 60°, with the ability to fully invert and evert his ankle.

Dr. Hufford diagnosed claimant with a right lateral meniscal tear and a bimalleolar fracture of the right ankle. Dr. Hufford found claimant to be at maximum medical improvement and assigned a 2% impairment to the right lower extremity based upon the *Guides*. Dr. Hufford's report further stated:

> [The partial lateral mensicectomy] is the only area of injury which warrants impairment and as a diagnosis related estimate takes into account all other consequences of his knee injury including any muscle atrophy in the thigh which was not measured in the conduct of this examination. He has a significant flexion contracture of the right knee causing his altered gait. However, the flexion contracture is a consequence of the underlying osteoarthritis that pre-existed his meniscal tear and therefore represents an aggravation and acceleration of this condition following the meniscal injury. Stated differently, without the underlying osteoarthritis he would not have had the same result from his arthroscopy resulting in the flexion contracture and under the principal of the prevailing factor this does not warrant impairment. He does not have evidence for a disorder of glutition and mastication and therefore no impairment is warranted as he appears to have had restorative care for the dental component of his injury. He has developed low back pain for which he has sought care. While this may be influenced by altered gait, under the principal of prevailing factor this is not solely and exclusively a consequence of his right lower extremity injury and therefore does not warrant impairment. Trochanteric bursitis only warrants impairment if it results in altered gait, not if it is a consequence of altered gait. His bimalleolar fracture has healed completely without evidence for any malalignment and without any range of motion impairments or signs of muscle atrophy or nerve impairment there is no means to provide an impairment rating for this injury in the AMA Guides, 4th edition.

Dr. Hufford did not provide any permanent restrictions for the work injury, but recommended claimant avoid climbing ladders due to his right knee flexion contracture.

Claimant testified at the June 5, 2013 regular hearing. Regarding the status of his right ankle at that time, claimant testified:

> A. I think the right ankle, is quite a bit better. I've got all the movement in my right ankle. I don't run or I don't jog anymore or do any kind of legwork at say a facility or on the treadmill. I can walk on the treadmill. So the right ankle, I think, is pretty good.
>
> Q. Do you still have some symptoms with it?
>
> A. Yes.
>
> Q. What symptoms do you still have?
>
> A. Well, I still have stinging in it once in a while. Very sharp sting. I don't know if that's just part of having the plate or could be weather-related, but every once in awhile it will have a dull kind of ache, but not really enough to - - not enough to hurt or debilitate.[2]

Regarding the status of his right knee, claimant testified:

> A. The right knee is constantly stiff. I have to have something to hold onto to get up. I don't care if it's - - I know there's a judge lady here, but like sitting to go to the bathroom or something, I have to hold onto something to get up. Like to get up off the floor, I have to roll over on the side and put this leg up first to press on this one to get up off the floor. Still stiff. I take probably eight or ten ibuprofen per day. It doesn't have, like, a constant pain, but it's - - it's just a dull kind of pain and I just figured that it's part of it, just live with it. I limp and that probably bothers me - -
>
> Q. Where does it bother you when you limp?
>
> A. Right on the - - there's the left side there that he said it really would - - I don't know if that was Dr. Loewen that said it, but may need surgery on it some day. It's just the whole part of the knee, right on either side of the kneecap here.[3]

Claimant also testified Dr. Loewen told him he will need additional right knee surgery in the future.[4]

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[2] R.H. Trans. at 16.

[3] *Id.* at 16-17.

[4] *Id.* at 25.

Claimant testified that in addition to his ankle causing him to limp, his knee stiffness also caused him to limp, adding to his right-sided back discomfort.[5] He testified about his right hip pain as follows:

> Um, my right hip hurts when I sleep. When I lay over, it - - Dr. Loewen had said something about - - well, said it might be bursitis on that. I said, well, it's funny that none of this ever hurt until I had the accident. So for me, you know, I have to either switch from one side or the other. I sleep either on the left side or right side. So ibuprofen helps and that's how I get to - - I can sleep on my back, which I really don't care to, but I just put up with it and just take ibuprofen.[6]

Regarding his chipped or cracked teeth, claimant had restorative care by his personal dentist. At the regular hearing, claimant replied "No" when asked, "Are you having problems with your teeth now?"[7]

With respect to his loss of employment, claimant testified he did not know the reason his employment was terminated, but his boss told him his head was not "in the game."[8]

Dr. Murati testified on June 14, 2013, basically reciting the content of his report. Dr. Murati also provided restrictions that would limit claimant to light duty work. Dr. Murati reviewed a task list provided by Robert Barnett, Ph.D.,[9] a vocational counselor, and opined claimant could no longer perform 5 of the 9 tasks for a 55.5% task loss, based on his opinion that claimant required restrictions limiting him to light duty work. Dr. Murati testified that if claimant no longer had complaints relating to glutition or mastication, he would have no impairment involving the teeth injuries.[10] Regarding claimant's ankle, he tested "pretty much normal" in all objective ways, according to Dr. Murati, who noted claimant had full range of motion, his sensation was fine, he had stability and had "healed pretty well."[11] Dr. Murati's right ankle rating was solely based upon claimant's subjective complaints of pain associated with "weather change."[12]

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[5] *Id.* at 14-15.

[6] *Id.* at 17-18.

[7] *Id.* at 26.

[8] R.H. Trans. at 19.

[9] Dr. Barnett conducted a vocational assessment of claimant on March 2, 2013.

[10] Murati Depo. at 38-39.

[11] *Id.* at 43.

[12] *Id.* at 32, 43-46.

Page six of SALJ Shelor's November 16, 2013 Award concluded, in relevant part:

> The Court . . . adopts the report of Dr. Hufford as the Court appointed physician to provide an independent medical examination which is more current and accurately describes Claimant's medical condition. Dr. Murati's assessment is based upon pain guides brought on by changes in the weather. There are no tables used or objective findings and no malignment, nerve impairment, range of motion deficit or muscle atrophy are identified.
>
> Dr. Hufford issued no restrictions, except for climbing ladders, and no resulting task loss as a result of the injury. Dr. Hufford opines a 2% impairment to the lower extremity. Therefore, the Court rejects any argument of a work disability in this matter.
>
> . . .
>
> The Court's independent medical examination of Dr. Hufford opines, "No recommendations as stated should be construed as an order to commence or continue any current treatment." Therefore, the Court concludes no further medical treatment is necessary.

Claimant filed a timely appeal.

## PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) states:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states, in relevant part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> . . .
>
> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

. . .

(u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.

K.S.A. 2011 Supp. 44-510d states, in relevant part:

(b) If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . .

(14) For the loss of a foot, 125 weeks.

(15) For the loss of a lower leg, 190 weeks.

(16) For the loss of a leg, 200 weeks.

. . .

(23) Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

(24) Where an injury results in the loss of or loss of use of more than one scheduled member within a single extremity, the functional impairment attributable to each scheduled member shall be combined pursuant to the fourth edition of the American medical association guides for evaluation of permanent impairment and compensation awarded shall be calculated to the highest scheduled member actually impaired.

(c) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i, and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 2011 Supp. 44-510e(a) states in part:

In case of whole body injury resulting in temporary or permanent partial general disability not covered by the schedule in K.S.A. 44-510d, and amendments thereto, the employee shall receive weekly compensation as determined in this subsection during the period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks.

. . .

(2)(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

. . .

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

K.S.A. 2011 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2011 Supp. 44-551(i)(1) states, in part:

> [T]he board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings.

K.S.A. 2011 Supp. 44-555c(a) states, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The review by the Board of a judge's order is de novo on the record.[13] The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[14] The Board, on de novo review, makes its own factual findings.[15]

"It is the function of the district court to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability."[16] From July 1, 1993 forward, the Board has assumed the role of the district court.[17]

K.A.R. 51-7-8(c)(3) states, "Each injury involving the hip joint shall be computed on the basis of a disability to the body as a whole." K.A.R. 51-7-8(c)(4) states, "Each injury at the joint on a scheduled member shall be considered a loss to the next higher schedule."

## ANALYSIS

Claimant asserts a variety of potentially impairing conditions, including a dental injury, ankle pain, a meniscal tear, flexion contracture, patellofemoral syndrome, thigh atrophy and trochanteric bursitis. These conditions will be addressed individually.

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[13] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[14] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[15] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 169 P.3d 1147 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[16] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 786, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[17] See *Hall v. Roadway Express, Inc.*, 19 Kan. App. 2d 935, 939, 878 P.2d 846 (1994); see also *Riedmiller v. Harness*, 29 Kan. App. 2d 941, 34 P.3d 474 (2001).

*Dental Impairment*

Claimant's concession at oral argument that he had no impairment secondary to his dental injury was warranted. Dr. Murati indicated claimant would not have impairment relating to mastication if claimant denied problems with glutition, taste or mastication and denied problems with his teeth at the regular hearing.[18] Claimant, in his testimony, denied problems with his teeth. Claimant also denied to Dr. Hufford any difficulty with glutition, taste or mastication. Claimant failed to prove dental, teeth or mastication impairment.

*Ankle Impairment*

Claimant testified he has ankle pain with weather changes. Despite claimant having eight or nine screws and a plate in his ankle, the medical opinions show little objectively wrong with claimant's ankle, such as decreased range of motion, sensation or strength, or documented nerve damage. The doctors agreed claimant had no measurable ankle impairment. "An individual who complains of constant pain but who has no objectively validated limitations in daily activities has *no* impairment."[19] Under the statutory definition of impairment, claimant failed to prove his ankle injury resulted in a loss of a portion of the his total physiological capabilities. Claimant failed to prove ankle impairment.

While Dr. Murati opined claimant's ankle pain warranted a 5% whole body rating based on Chapter 15 of the *Guides*, titled "Pain," there are problems with his approach.

First, claimant's ankle injury is covered by K.S.A. 2011 Supp. 44-510d. Such statute specifically limits disability compensation for a scheduled injury to benefits available under the statute. Claimant cannot be awarded whole body impairment for a scheduled injury. Moreover, the situs of the disability determines the benefits available.[20] Even if claimant had measurable ankle impairment, it would be limited to the lower leg.

Second, while the *Guides* recognize pain can be an impairment as based on physician judgment, the *Guides* observe that pain is subjective and immeasurable, often viewed with "suspicion and disbelief."[21] The concept of impairment due to pain is "problematic as well as controversial."[22] In general, tables and figures listing impairments in the *Guides* applicable to various organ systems already account for pain.[23]

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[18] Murati Depo. at 38-39.

[19] *Guides* at 309.

[20] See *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986).

[21] *Guides* at 303.

[22] *Id.*

[23] *Id.* at 304.

Complaints of pain, standing alone, do not necessarily result in a finding of impairment. Based on the facts of this case, claimant's ankle pain that only coincides with weather changes is not a permanent impairment. As noted above, claimant failed to prove a permanent functional impairment involving his right ankle.

*Meniscal Tear*

Both doctors agreed claimant's meniscal repair caused a 2% rating to his right lower extremity. The meniscal injury resulted in a 2% right lower extremity impairment rating.

*Flexion Contracture*

Dr. Hufford noted claimant has a "significant flexion contracture of the right knee causing his altered gait." Dr. Hufford assigned no impairment for claimant's flexion contracture because: (1) such condition, following the meniscal tear, was a consequence, aggravation and acceleration of underlying, preexisting osteoarthritis; and (2) but for claimant's underlying osteoarthritis, claimant's flexion contracture would not have occurred as a result of his knee surgery, such that the prevailing factor in the development of claimant's flexion contracture was his preexisting osteoarthritis.

Dr. Murati assigned claimant a 20% lower extremity impairment for the flexion contracture. Dr. Murati was aware of claimant's underlying arthritis, but did not state claimant developed flexion contracture as an aggravation or acceleration of a preexisting arthritic condition. Rather, Dr. Murati stated claimant's accident was the "prevailing factor in the development of his conditions[,]" which included his flexion contracture.[24] Dr. Murati also testified claimant's diagnoses, including flexion contracture, were the direct result of the accidental injury.[25]

Determination of the prevailing factor is based on all of the relevant evidence, which makes for a very close decision. While Dr. Hufford opined claimant's preexisting arthritis was the prevailing factor in his development of a flexion contracture, the Board disagrees. Claimant did not have the flexion contracture prior to his knee surgery. Dr. Hufford stated claimant's flexion contracture was the result of his knee surgery and claimant would not have had the "same result" but for his osteoarthritis. To the Board, it is evident claimant's flexion contracture developed primarily because of his knee surgery. Claimant's arthritis contributed to a lesser degree in development of the flexion contracture, but absent the accidental injury, which necessitated knee surgery, claimant would not have developed the flexion contracture. The Board concludes the accident, which led to the injury and the need for surgery, was the prevailing, primary and dominant factor causing claimant's flexion contracture injury, medical condition, resulting disability and impairment.

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[24] Murati Depo., Ex. 2 at 6.

[25] *Id.* at 15.

Claimant's injury did not solely result in an aggravation or acceleration of a preexisting arthritic knee. While claimant had preexisting arthritis, he did not have a flexion contracture prior to his accidental injury. Claimant's accidental injury and need for surgery caused the development of a new medical condition and impairment, not an aggravation of a preexisting condition. Claimant's flexion contracture results in a 20% right lower extremity functional impairment.

*Patellofemoral Syndrome*

A footnote to Table 62 of the *Guides* allows a 5% lower extremity impairment for a patient with "a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on roentgenograms . . . ."[26] The record is not clear as to the presence or absence of joint space narrowing. As such, claimant did not meet his burden of proving impairment based on patellofemoral syndrome.

*Thigh Atrophy*

Dr. Murati, using Table 37 of the *Guides*, rated claimant as having a 13% impairment to his right lower extremity based on right thigh atrophy. Dr. Murati testified claimant's right thigh atrophy was more probably than not the result of claimant's knee surgery.[27] Dr. Hufford opted to not measure for any muscle atrophy in claimant's right leg, stating that the 2% knee rating would properly account for any resulting thigh atrophy.[28] The Board adopts Dr. Murati's 13% right lower extremity rating for atrophy, which is derived from a specific table in the *Guides*. Claimant's 2% lower extremity rating for his meniscus tear does not properly account for his right thigh atrophy.

Combining[29] claimant's various lower extremity impairments results in claimant having an overall 31% right lower extremity impairment.

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[26] *Guides* at 83. "Roentgenograms" are radiographs or x-rays.

[27] Murati Depo. at 29.

[28] There is commentary in the *Guides* that "[i]mpairment due to malunion of a fracture should be estimated according to the diagnosis. The expected muscle weakness or atrophy is included in the diagnosis-related estimates, but shortening is a different impairment." *Guides* at 84. The Board cannot determine if such commentary concerns all of the diagnosis-based lower extremity estimates starting on page 85 of the *Guides*, such that a 2% rating for a meniscal tear would also account for resulting thigh atrophy, or only has limited application concerning fracture malunions.

[29] Under terminology used in the *Guides*, adding and combining impairments are different functions. A rating derived from combining ratings is based on the Combined Values Chart starting on page 322 of the *Guides*. An example noted on such page shows that a 35% impairment combined with a 20% impairment results in a 48% impairment (not added to get 55%). In this case, a 20% impairment combined with a 13% equals 30% impairment, combined with 2% impairment equals 31% impairment.

*Trochanteric Bursitis*

Dr. Murati provided claimant a 7% right lower extremity impairment rating for right trochanteric bursitis, which developed because of claimant's right ankle and knee injuries.[30] Dr. Hufford provided no impairment, theorizing, "Trochanteric bursitis only warrants impairment if it results in altered gait, not if it is a consequence of altered gait."

The Board disagrees with Dr. Hufford's statement noted above, as we cannot find support for such statement in the *Guides*. Page 85 of the *Guides* states "Trochanteric bursitis (chronic) with abnormal gait" warrants a 3% whole person rating or a 7% lower extremity rating. Claimant undeniably has trochanteric bursitis and abnormal gait.

Claimant's trochanteric bursitis is a hip injury. "Hip injuries are . . . classified as permanent partial general disabilities."[31] A permanent injury not covered under K.S.A. 44-510d is a body as a whole injury covered by K.S.A. 44-510e.[32] "The Board has consistently ruled that trochanteric bursitis in a claimant's hip is a general body disability, not a scheduled injury."[33] The fact the *Guides* characterize trochanteric bursitis as a lower extremity impairment does not mean Kansas law recognizes trochanteric bursitis as a scheduled injury. The *Guides* are not tailored to the Kansas statutory scheme.[34]

The 7% right lower extremity impairment provided by Dr. Murati for the right trochanteric bursitis converts to 3% to the body as a whole under the *Guides*. The Board concludes claimant has a 3% whole person rating for trochanteric bursitis. Claimant's 31% right lower extremity impairment converts to 12% to the body as a whole.[35] Combining claimant's 12% impairment with his 3% rating results in a 15% whole body rating.

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[30] Murati Depo. at 31.

[31] *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 856, 942 P.2d 591 (1997).

[32] See K.S.A. 2011 Supp. 44-510e(a). See also *Kuzmic v. Staples, Inc.*, No. 1,052,151, 2012 WL 2061768 (Kan. WCAB May 17, 2012) ("Because claimant suffered an injury to his hip he is entitled to compensation for a whole body disability pursuant to K.S.A. 44-510e."); *Jones v. Securitas Security Services*, No. 1,037,902, 2010 WL 4963583 (Kan. WCAB Nov. 29, 2010) ("Claimant has a hip injury, which does not fall within the schedule of K.S.A. 44-510d. Consequently, the calculation of claimant's permanent partial disability benefits is governed by K.S.A. 44-510e . . . ."); and *Hildebrandt v. Ursuline Sisters, Inc.*, No. 1,017,601, 2006 WL 1275448 (Kan. WCAB Apr. 7, 2006).

[33] *Eubank v. State of Kansas*, No. 1,042,622, 2012 WL 4763662 (Kan. WCAB Sept. 12, 2012); see also *Dehaemers v. Elizabeth Layton Center*, No. 1,043,391, 2012 WL 4040452 (Kan. WCAB Aug. 1, 2012); *Mountford v. Metro Xpress*, No. 1,038,117, 2009 WL 5385885 (Kan. WCAB Dec. 21, 2009); and *Brown v. Boeing Military Airplane Co.*, No. 173,507, 1996 WL 167236 (Kan. WCAB Mar. 18, 1996).

[34] See *Redd v. Kansas Truck Center*, 291 Kan. 176, 196-97, 239 P.3d 66 (2010).

[35] "Multiplying a lower extremity impairment by 0.4 yields the whole-person impairment percent." *Guides* at 75.

*Work Disability*

*Bergstrom*[36] held K.S.A. 44-510e(a) allowed work disability awards to injured workers with whole body impairment and at least 10% wage loss, regardless of why they had wage loss. As of May 15, 2011, the legislature changed Kansas law regarding work disability. Under the new law, claimant may receive a work disability award if: (1) his whole body impairment exceeds 7.5% to the body as a whole; and (2) he has at least 10% wage loss "directly attributable to the work injury and not to other causes or factors." In such case, the work disability is an average of "the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury."[37]

Claimant's whole body impairment exceeds 7.5% to the body as a whole and he has wage loss exceeding 10%, but the evidence regarding the *cause* of his wage loss is sparse. Claimant argues the "only apparent reason for termination was due to the work injury and Respondent has not introduced any evidence to establish that the termination was due to anything but the work injury and Mr. Keating's resulting physical disability."[38] Claimant's argument lacks support in the record. When claimant was asked what happened to his job, he stated:

> I don't really particularly know. I lost my wife on August 31st of '12 and at that time I knew that I had to have some kind of grieving time. The employer was – Doug was real kind and he said – actually, four days after the funeral, I went to work again and went to the Kansas State Fair and worked it for the full 12 days. I just felt that was something I should do, they needed the help, but I knew I needed a little bit of time off and he said go ahead and do that, go ahead and take a week off. Anyway, there was some grieving time. We'd only been married two years and so – so in the meantime, I – I know when I was laid off, he says, "I don't think your head's in the game."[39]

This is nearly the only evidence regarding whether claimant's wage loss was directly attributable to his work injury and not to other causes or factors.[40] Claimant bears the burden of proof. Such evidence is insufficient proof to establish claimant's wage loss was directly attributable to his work injury and not other causes or factors. As such, claimant has not met a threshold requirement for work disability. The Board need not address claimant's post-injury wage earning capability or task loss, as such issues are moot.

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[36] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[37] K.S.A. 2011 Supp. 44-510e(a)(2)(C)(ii).

[38] Claimant's Brief at 3.

[39] R.H. Trans. at 18-19.

[40] Claimant also suspected he cannot get a job based lack of experience and his age. *Id.* at 21.

*Future Medical*

The fact that claimant has surgical hardware in his ankle, by itself, would lend toward a finding he is entitled to future medical treatment.

Claimant is entitled to seek future medical treatment on proper application to the Division of Workers Compensation. Dr. Hufford's statement that claimant does not need *current* treatment fails to address the question of *future* treatment. Dr. Murati testified claimant will require a future knee replacement and he should have at least yearly follow-up appointments for his knee. Claimant, when asked by both counsel, testified that Dr. Loewen advised that he might or will need a total knee replacement in the future. The evidence claimant presented sufficiently overcomes the statutory presumption that respondent's obligation to provide medical treatment terminated upon claimant reaching maximum medical improvement.

## CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board modifies the SALJ's Award to find:

- Claimant proved a 15% impairment to the body as a whole as a result of impairment involving his right lower extremity and right trochanteric bursitis, which is an injury to the body as a whole.

- Claimant failed to prove entitlement to a work disability because he did not prove he had a wage loss of at least 10% that was "directly attributable to the work injury and not to other causes or factors."

- Claimant is entitled to seek future medical treatment on proper application.

- The SALJ's Award is otherwise affirmed to the extent it does not conflict with the Board's Award.

## AWARD

**WHEREFORE**, the Board modifies Special Administrative Law Judge Jerry Shelor's November 6, 2013 Award as listed in the "Conclusion" section listed above.

The claimant is entitled to 19.30 weeks of temporary total disability compensation at the rate of $425.59 per week or $8,213.89 followed by 61.61 weeks of permanent partial disability compensation at the rate of $425.59 per week or $26,220.60 for a 15% permanent partial general body functional impairment, making a total award of $34,434.49, all of which is due and owing and ordered paid in one lump sum, less any prior payments.

**IT IS SO ORDERED.**

Dated this _____ day of March 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Gary K. Jones

Special Administrative Law Judge Jerry Shelor